Articles

Personal liability, vicarious liability, non-delegable duties and protecting vulnerable people

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A policy concern underlying the imposition on defendants of a liability in tort which influences the courts, sometimes expressly and sometimes implicitly, is a need to protect and assist persons who may be seen to have been in a vulnerable position at the time they suffered injury or harm. Leading decisions concerning the imposition on defendants of a duty of care in negligence, of vicarious liability in respect of the deliberate or negligent actions of another person, and of a duty which cannot be delegated to another person, all have given expression to, and support for, a concept of plaintiff vulnerability. Indeed, recent decisions in the United Kingdom, Canada and Australia concerning the abuse of children by persons in a position of power and authority and which significantly extend the reach of vicarious liability provide particularly apt examples. The aim of this article is to show how the three different kinds of claim can provide a remedy for vulnerable people and to identify any links and overlaps between them. Certainly it is apparent that the idea of vulnerability can provide helpful guidance for a court faced with a novel or borderline question of liability.

It is not especially controversial to assert, at least as a broadly desirable objective, that the principles of the common law of torts should have a role to play in protecting vulnerable people.[1] But immediate difficulty is likely when we start to consider what this proposition may mean in practice and how exactly the objective may come to be achieved. The common law courts seek to lay down rules and principles of general application. They do not have the same ability or the same freedom as legislatures have to craft detailed rules that can be expressed to apply specifically to defined (and, maybe, deserving) claimants.[2] But the courts nonetheless are able to bring into account the notion of vulnerable persons as a class or category of claimant or of defendant, and in this way may accord them special treatment when resolving disputed issues of liability. The concern of this article is with the former of these categories,

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1 Not everyone will agree. Rights theorists reject the relevance of policy concerns, such as, in particular, a wish to protect the vulnerable, in determining the ambit of rules of liability in tort. See especially R Stevens, *Torts and Rights*, Oxford University Press, 2007; A Beever, *Rediscovering the Law of Negligence*, Hart, 2007, especially pp 194–5. There are significant objections to a rights analysis of tort law, which will not be developed here.

2 A modern instance of special legislative attention is the protection afforded in many countries to 'consumers' in their dealings with commercial entities. Notable recent examples are the Competition and Consumer Act 2010 in Australia and the Consumer Rights Act 2015 in the United Kingdom.

that is, plaintiffs who are in some sense vulnerable who are making a claim for damages.[3] We can find support for the idea that a plaintiff's vulnerability is or may be a relevant concern in decisions on the imposition on defendants of a duty of care in negligence, in decisions governing the imposition on defendants of vicarious liability in respect of the deliberate or negligent actions of another person, and in decisions recognising that defendants may be under a duty which cannot be delegated to other persons.[4] The aim of this article is to examine these three ways in which the common law courts have given expression to, and support for, the concept of plaintiff vulnerability, and, further, to consider any links and overlaps between them.[5] The primary focus is on the decisions of the courts in the United Kingdom, Australia, Canada and New Zealand, although cases from other jurisdictions are mentioned as well.

These introductory words have not addressed the question as to when, exactly, a litigant may be regarded as vulnerable. It would hardly be possible to compile an exhaustive list of qualifying circumstances or conditions, and the underlying concept is clear. Speaking broadly, our concern is with a plaintiff's relationship or connection with a defendant where, by reason of the plaintiff's weakness and/or the defendant's strength or power, the plaintiff typically is at a disadvantage in relation to the other, or is open to mistreatment or exploitation, or is reliant on the other for protection.[6] One can point to common instances — children under the control of adults, prisoners supervised by custodians, religious figureheads having influence over their flock. But, as will be seen, the question ultimately will be determined on the particular facts of a case. The decisions that are examined in the article will help illuminate what 'vulnerability' may encompass.

Alleging personal liability for negligence

Duty formulae

The threshold condition for the imposition of liability in any negligence action is that the defendant must have owed a legal duty to the plaintiff to take care. The duty requirement exists in order to give some structure to the law of negligence, to assist in making the application of the law reasonably predictable and to confine the ambit of liability within reasonably acceptable boundaries. But quite how the question ought to be articulated and these desirable objectives achieved of course has preoccupied the courts on

3 Of course, vulnerable defendants are protected by the common law or equity in various ways. For example, the plea of non est factum was originally developed to protect those who were illiterate or blind, and the notion of vulnerability remains relevant in determining the question today. Again, the principles of equity protecting vulnerable persons from liability by reason of another person's undue influence or unconscionable behaviour are long established.

4 This means that the defendant cannot delegate legal responsibility in respect of performance of the duty, not that the defendant cannot delegate actual performance of the task in question.

5 For an earlier examination on the theme of vulnerability, see J Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Aus Bar Rev* 135.

6 For discussion about 'consumers' (with possible application of relevant concepts in the present context), see Consumer Affairs Victoria, *Discussion Paper: What do we Mean by 'Vulnerable' and 'Disadvantaged' Consumers?*, Australian Government, 2004; P Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 *JCP* 119.

countless occasions. An orthodox explanation, founded on the judgments of Lord Atkin in *Donoghue v Stevenson*[7] and of Lord Bridge in *Caparo Industries Plc v Dickman*,[8] goes something like this. A multitude of cases has determined whether there is a duty in a great variety of differing circumstances. In making their decisions the courts look to the accumulated experience of past courts in weighing the circumstances before them. This tends to mean that the existence or ambit of a duty in any particular case is usually well established and is not a live issue. However, in novel or borderline cases the courts have found it helpful to divide the inquiry into stages. So they ask whether the defendant should reasonably have foreseen the harm to the class of plaintiffs in question, whether that harm was suffered by the plaintiff's 'neighbour', in the sense of a person who is closely and proximately affected by the defendant's conduct, and whether it is fair, just and reasonable that a duty be recognised in all the circumstances of the case. Alternatively, taking an approach based on the judgment of Lord Wilberforce in *Anns v Merton London Borough Council*,[9] they may make, first, an 'internal' inquiry into everything bearing upon the relationship between the parties, and, second, an 'external' inquiry into policy factors outside that relationship.[10]

These staged approaches provide us with structures for determining contested duty issues, but whether the stages in truth involve discrete criteria is a matter of dispute. Lord Oliver in *Caparo* found it difficult to resist the conclusion that what had been treated as separate requirements were in most cases merely facets of the same thing. His Lordship pointed out that in some cases the degree of foreseeability was such that it was from that alone the requisite proximity could be deduced, while in others the absence of the essential relationship could most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible.[11] Further, in *Michael v Chief Constable of South Wales Police*[12] Lord Toulson noted that, paradoxically, Lord Bridge's words had sometimes come to be treated as a blueprint for deciding cases, despite the pains which the author took to make clear that it was not intended to be any such thing.

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7 [1932] AC 562.

8 [1990] 2 AC 605; (1990) 1 ACSR 636; [1990] 1 All ER 568; [1990] BCLC 273 (*Caparo*).

9 [1978] AC 728 at 751–2; [1977] 2 All ER 492 at 499–50 (*Anns*).

10 Both the Supreme Court of Canada and the Supreme Court of New Zealand have favoured the latter, two stage, inquiry: see, in particular, *Cooper v Hobart* [2001] 3 SCR 537; 2001 SCC 79; *North Shore City Council v Attorney-General* [2012] 3 NZLR 341; [2012] BCL 280; [2012] NZSC 49; BC201262230. Singapore also takes a two-stage approach: see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100; [2007] SGCA 37. By contrast, in Hong Kong and in Ireland the *Caparo* formula is used: *Luen Hing Fat Coating & Finishing Factory Ltd v Waan Chuen Ming* [2011] 1 HKEC 97; *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 at 139. The High Court of Australia has preferred an unstructured assessment of the 'salient features' of a particular case, with the inquiry being based ultimately on *Donoghue v Stevenson* [1932] AC 562: see *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147; *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 191 ALR 449; [2002] HCA 35; BC200205111; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54; BC200207277.

11 *Caparo* [1990] 2 AC 605 at 633.

12 [2015] AC 1732; [2015] 2 All ER 635; [2015] 2 WLR 343; [2015] UKSC 2 at [106].

Now it is true that there is no special magic in the formulation of these tests, and it is also true that the criteria may overlap or merge. The foreseeability of damage to the plaintiff or a class of plaintiffs and the degree of proximity or neighbourhood between the parties are closely related issues. Again, the proximity question is bound up with the inquiry as to what is fair, just and reasonable in the circumstances of the case, for they both fulfil a controlling function and limit the potential ambit of a defendant's liability. Even so, the focus of each of the criteria is different. The question whether harm is foreseeable is conceptually distinct from the proximity question, although both are internal in the sense that they are concerned with the nature and the closeness of the connection between the parties. Again, determining what is fair, just and reasonable and the inquiry into external factors outside the parties' relationship both look to the effect on non-parties and on the structure of the law and on society generally, and very arguably it is helpful to separate out this aspect of the duty issue.

Influential policies

Of course, there is a more fundamental question arising out of the *Caparo* or *Anns* approach or any other test. Whatever formula is adopted, it cannot in itself direct us towards any particular conclusion. Rather, the actual decision must depend upon a value judgment of the court concerned, based upon its assessment of all the circumstances that it considers relevant to its inquiry. So, returning to *Caparo* once more, Lord Oliver said that to search for any single formula which would serve as a general test of liability was to pursue a will-o'-the-wisp. He thought that the attempt to state some general principle which would determine liability in an infinite variety of circumstances served not to clarify the law but merely to bedevil its development in a way which corresponded with practicality and common sense. Yet while the view that there can be no general, all-embracing, test is hardly contestable, it does not mean that nothing in the way of substantive guidance is possible. The question we need to consider is whether we can move beyond mere structure or formulae that can help organise our thinking[13] and identify matters of substance that can provide us with some direction as to what we should be thinking about.

The duty question may be argued in an almost unlimited range of circumstances, and all kinds of considerations may be taken into account, but it by no means follows that if the question has not been determined it is entirely at large or that every new decision is simply an ad hoc determination of policy. A court's initial focus is likely to be on any possible analogies with existing case law, and the substantive policies underlying such case law equally will influence any incremental development that the court may be minded to favour. This in turn raises the question whether or to what extent we can distil some influential policies from existing cases, irrespective of the existence or the range of authority concerning the particular issue before a court. An exhaustive list of all potentially influential factors would be

13 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294 per Cooke P.

impossible to compile, even assuming it would be desirable to do so,[14] yet underlying a great many of the courts' decisions we can identify certain core conceptions of policy that can provide assistance in determining how to resolve many disputed duty issues.[15] They include, inter alia, respect for the autonomy and freedom of action of the individual in deciding whether there is a duty to help or to prevent harm to another;[16] a desire not to impose on defendants an indeterminate burden of liability;[17] a need for any new duty to operate coherently and consistently with other existing rules governing the

14 However, see the list of factors compiled by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; 259 ALR 616; [2009] NSWCA 258; BC200907980 at [103]. See also J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menu' in *The Law of Obligations: Essays in Celebration of John Fleming*, P Cane and J Stapleton (Eds), Oxford University Press, 1998, p 61.

15 This thesis is developed in S Todd, 'A Methodology of Duty' in *Centenary Essays for the High Court of Australia*, P Cane (Ed), LexisNexis Butterworths, 2004, p 221. They are at least core themes: see *Houghton v Saunders* [2015] 2 NZLR 74; [2014] NZHC 2229; BC201463119 at [673]–[678].

16 This basic principle can be fleshed out by reference to the political, moral and economic considerations identified by Lord Hoffmann in *Stovin v Wise* [1996] AC 923 at 944; [1996] 3 All ER 801 at 819. In political terms it was less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect. A moral version of this point might be called the 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress might apply to a large and indeterminate class of people who happened to be able to do something. Why should one be liable rather than another? Further, in economic terms, the efficient allocation of resources usually required an activity should bear its own costs. If it benefited from being able to impose some of its costs on other people, the market was distorted because the activity appeared cheaper than it really was. So there needed to be some special reason why there should be a duty to act, which might be found where a person had undertaken to do so, or had induced reliance on him doing so, or had taken on the responsibilities of the owner or occupier of property. Again, in *Mitchell v Glasgow City Council* [2009] 1 AC 874; [2009] 3 All ER 205; [2009] 2 WLR 481; [2009] UKHL 11 at [23], Lord Hope, giving an overview, recognised that a duty to intervene might exist where a defender (i) had created a source of danger; or (ii) had exercised control over another; or (iii) had assumed a responsibility to or induced reliance by the pursuer. See also *Michael v Chief Constable of South Wales Police* [2015] AC 1732; [2015] 2 All ER 635; [2015] 2 WLR 343; [2015] UKSC 2 at [97]–[101] per Lord Toulson JSC; J Goudkamp, 'A Revolution in Duty of Care' (2015) 131 *LQR* 519.

17 In New Zealand, in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 306, Richardson J referred to a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility; and see *North Shore City Council v Attorney-General* [2012] 3 NZLR 341; [2012] BCL 280; [2012] NZSC 49; BC201262230 at [159]. In Australia, in *Tame v New South Wales: Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 191 ALR 449; [2002] HCA 35; BC200205111 at [5], Gleeson CJ observed that the law is concerned not only with the compensation of injured plaintiffs but also with the imposition of liability upon defendants, and the effect of such liability upon the freedom and security with which people may conduct their ordinary affairs. Examples of the so-called floodgates factor are legion: see, in particular, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907; (1991) 8 BMLR 37 (mental injury suffered by secondary victims); *Caparo* [1990] 2 AC 605; (1990) 1 ACSR 636; [1990] 1 All ER 568; [1990] BCLC 273; *Hercules Managements Ltd v Ernst & Young* [1997] 2 SCR 165 (economic loss suffered by investors in negligently audited companies); *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding* [1997] 3 SCR 1210 (relational economic loss).

dispute before the court;[18] and, our present concern, a wish to protect persons who are perceived to be vulnerable and deserving of special consideration.

Vulnerable victims

A policy that brings into account a victim's vulnerability has both a positive and a negative aspect. On the one hand, the concern is with protecting persons in a vulnerable position, who have no reasonably available means of protecting themselves. The notion of a plaintiff's special vulnerability and need for protection certainly has been singled out in decisions of the House of Lord,[19] of the High Court of Australia[20] and of the NZ Court of Appeal and Supreme Court.[21] On the other hand, if people are well positioned to look after themselves a duty may be thought to be inappropriate. The court is concerned with the steps they could reasonably have taken to look after their own interests.[22] This idea already underlies various defences to liability, notably that the plaintiff failed to take reasonable steps in mitigation of a loss, that he

18 This factor can be seen to arise in a number of contexts, although the argument certainly is likely to be contestable. For example: (i) the courts may seek to prevent the principles of negligence from improperly encroaching upon the province of contract (*D & F Estates Ltd v Church Commissioners for England* [1989] AC 177; [1988] 2 All ER 992; (1988) 15 Con LR 35; *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL)); (ii) recognition of a duty in negligence may tend to undermine other, more stringent, principles of tort liability (*South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282) (negligence as compared to defamation, malicious prosecution) (but compare *Spring v Guardian Assurance Plc* [1995] 2 AC 296; [1994] 3 All ER 129; *Young v Bella* [2006] 1 SCR 108; 2006 SCC 3); (iii) a negligence duty may be seen as operating inconsistently with the provisions of a statute (*Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404; [2001] HCA 59; BC200106147; *B v Attorney-General* [2004] 3 NZLR 145; [2003] 4 All ER 833; [2003] UKPC 61; *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373; [2005] 2 All ER 443; [2005] UKHL 23) (no duty owed to suspected abusers of children where there was a potentially conflicting statutory obligation to protect the children); (iv) a negligence duty should not tend to undermine the proper relationship between judicial and executive power (*Anns* [1978] AC 728 at 754; [1977] 2 All ER 492 at 500; *Cooper v Hobart* [2001] 3 SCR 537; [2001] SCC 79).

19 For example, *Smith v Bush* [1990] 1 AC 831; [1989] 2 All ER 514; *White v Jones* [1995] 2 AC 207; [1995] 1 All ER 691 (*White*); *Stovin v Wise* [1996] AC 923 at 940; [1996] 3 All ER 801 at 815.

20 For example, *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 151 ALR 147; [1998] HCA 3; BC9800020; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; 167 ALR 1; [1999] HCA 59; BC9907273; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606; [1999] HCA 36; BC9904592.

21 For example, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 317–18; *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324; [2004] BCL 617; BC200460989 at [61]–[62]; *Couch v Attorney-General* [2008] 3 NZLR 725; [2008] BCL 657; [2008] NZSC 45; BC200821980 at [71]; *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95; BC201661728 at [43]–[55].

22 For example, *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 818-19; [1986] 2 All ER 145 at 156-7; *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113; [1991] 1 All ER 134; *Esanda Finance Corp Ltd v Peat Marwick Hungerfords (Regs)* (1997) 188 CLR 241 at 284; 142 ALR 750 at 783; 23 ACSR 71 at 104; BC9700700; *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1052.

or she assumed the risk, or that he or she was guilty of contributory negligence, but it can also have a role to play in the duty inquiry.[23]

If a person's vulnerable position is a relevant concern for a court in making a duty inquiry, then clearly it is necessary to determine who is to be treated as vulnerable for this purpose. The principle cannot simply contemplate a plaintiff who is poor or ignorant or who otherwise might be thought to be in need of protection because of his or her individual circumstances. Any such principle would very likely be unworkable and impossible to administer.[24] Indeed, and obviously, it would tend to discriminate against those who are rich or clever or resourceful. So the principle needs to operate in relation to certain *kinds* or *categories* of case which typically involve vulnerable plaintiffs. An example perhaps is found in the principle that one may be under a duty to act to prevent harm if one has induced a person to rely upon one doing so.[25] In this kind of case the victim may be deprived of the chance of assistance by third parties or the opportunity to take steps by way of self-protection and may also be lulled into a false sense of security.[26] And, fairly clearly, the idea of vulnerability is implicit in the principle.

The assumption of responsibility for a person or for a task may induce reliance by another, yet the cases do not indicate that reliance is always necessary. In some limited circumstances, and quite apart from contract, assuming responsibility for another or for performing a task can engender a duty to persons who are sufficiently closely and proximately affected by a failure properly to carry it out. And, usually, that person is in a vulnerable position. As regards another person, a classic instance is the duty of a parent or person in loco parentis, like a school authority, to take care to safeguard a child from danger on the road, or from dangerous premises, or from being

23 J Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *LQR* 249 at 265–6.

24 The difficulty is exemplified by the debate in jurisdictions accepting that a third party purchaser may have an action against the builder in respect of the costs of putting right defects in a building. The High Court of Australia has held that 'commercial' purchasers cannot sue as they are not vulnerable: *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; 205 ALR 522; [2004] HCA 16; BC200401482; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; 313 ALR 408; [2014] HCA 36; BC201408266. By contrast, one reason for the decision of the NZ Supreme Court in *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297; [2012] NZSC 83; BC201263017 *(Spencer on Byron)*, declining to draw a distinction between negligence claims involving residential and commercial owners of buildings was that the position as to vulnerability did not assist. Residential owners might be very well able to protect themselves and commercial owners might be highly vulnerable. However, it might be possible to draw a distinction between different types of building rather than between the circumstances of the owners of a building, which solution was adopted in *Spencer on Byron* in the Court of Appeal: *North Shore City Council v Body Corporate 207624* [2011] 2 NZLR 744; [2011] BCL 408; BC201161240.

25 *Stovin v Wise* [1996] AC 923 at 944; [1996] 3 All ER 801 at 819.

26 See, eg, *Al-Kandari v J R Brown & Co* [1988] QB 665; [1988] 1 All ER 833; *Hamilton Jones v David & Snape* [2004] 1 All ER 657; [2004] 1 WLR 924; [2003] EWHC 3147 (Ch); *Kent v Griffiths* [2001] QB 36; [2000] 2 All ER 474; [2000] 2 WLR 1158 at [14]; *Vowles v Evans* [2003] 1 WLR 1607; [2003] EWCA Civ 318; *Fullowka v Pinkerton's of Canada Ltd* [2010] 1 SCR 132; 2010 SCC 5; *Chandler v Cape Plc* [2012] 3 All ER 640; [2012] 1 WLR 3111; [2012] EWCA Civ 525; cf *Thompson v Renwick Group Plc* [2014] PIQR P18; [2014] EWCA Civ 635.

assaulted or abused.[27] As regards the taking on of a task, an example is *White v Jones*.[28] A testator instructed solicitors to draw up a new will giving a benefit to the plaintiffs, but died before the solicitors had acted on the instructions. The plaintiffs alleged that the solicitors were negligent in failing to carry out the instructions with due diligence. The House of Lords held that the solicitors were under a duty to take care, and one reason was that the solicitors, by accepting their instructions, had assumed responsibility for the task of procuring the execution of a skilfully drawn will knowing that the beneficiary was wholly dependent upon them carefully carrying out their function. The decision can be seen as creating a 'pocket of liability'[29] in circumstances where nobody else could protect the beneficiaries and they were the only persons likely to suffer loss if the will was negligently drawn. Other cases have declined to apply the *White* principle in arguably analogous circumstances where the plaintiff was not in a vulnerable position or dependent on the defendant or was reasonably able to take self-protective measures.[30]

This brief sketch of the apparent influence of a vulnerability principle on the question whether a person is under a duty to take care no doubt deserves to be explained and developed in a good deal more detail. For present purposes, however, it serves as a suitable introduction to the theme of this article. For just as the principle may sometimes bear upon the duty inquiry, it may also have an important role to play in relation to a person's possible vicarious liability for another's conduct or to whether a person may be held to be under a non-delegable duty to take care in respect of a task that has been delegated to another. In a number of recent — and major — decisions the courts have been extending and clarifying the circumstances in which these special forms of liability, both arising through someone else's conduct, can be held to exist. As will be explained, they constitute particularly clear instances where the courts can be seen to be providing special protection to vulnerable or defenceless persons. Indeed, they provide a very suitable setting for the courts in undertaking their task of developing the relevant principles.[31]

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27 Parents: *McCallion v Dodd* [1966] NZLR 710; *Tweed Shire Council v Howarth* [2009] NSWCA 103, (2009) Aust Torts Reports 82–101; BC200903619. Local authority: *Barrett v Enfield London Borough Council* [2001] 2 AC 550; [1999] 3 All ER 193; [1999] 3 WLR 79; BC9903369. Schools: *Barnes v Hampshire County Council* [1969] 1 WLR 1563; *Hahn v Conley* (1971) 126 CLR 276; [1972] ALR 247; BC7100610; *Geyer v Downs* (1977) 138 CLR 91; 17 ALR 408; BC7700096; *Commonwealth v Introvigne* (1982) 150 CLR 258; 41 ALR 577; BC8200087 (*Introvigne*); *Myers v Peel County Board of Education* [1981] 2 SCR 21.

28 [1995] 2 AC 207; [1995] 1 All ER 691; and see *Gorham v British Telecommunications Plc* [2000] 4 All ER 867; [2000] 1 WLR 2129.

29 J Stapleton, 'Comparative Economic Loss: Lessons From Case-Law-Focused "Middle Theory"' (2002) 50 *UCLA LR* 531 at 531.

30 For example, *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (no duty owed by solicitors to a director who had guaranteed a loan to the director's company where the solicitors, in breach of the lender's instructions, had negligently failed to explain to the director the nature of the guarantee); and see *Wells v First National Commercial Bank* [1998] PNLR 552; *Briscoe v Lubrizol Ltd* [2000] ICR 694; but compare *Kapfunde v Abbey National Plc* (1998) 45 BMLR 176; [1999] ICR 1; [1998] IRLR 583, where the plaintiff seemingly was vulnerable.

31 Sometimes both forms of liability may be found to arise out of the one set of facts. In

We will look first at the recent decisions extending the ambit of vicarious liability, and then turn to the developments in relation to the imposition of a non-delegable duty of care. As will be seen, protecting the vulnerable is an underlying theme under both heads, as an intended consequence of the widening of the relevant principles of liability under the first head and directly under the second.

Alleging vicarious liability

In *Various Claimants v Catholic Child Welfare Society*,[32] Lord Phillips said that the law of vicarious liability was on the move. In *Cox v Ministry of Justice*,[33] Lord Reed observed it had not yet come to a stop and that the instant appeal, and the accompanying decision of the Supreme Court in *Mohamud v WM Morrison Supermarkets Plc*,[34] provided an opportunity to take stock of where it had got to so far. In the discussion that follows we will be looking closely at these three decisions. We also will be examining *Prince Alfred College Inc v ADC*,[35] where the High Court of Australia recognised that its earlier decision in *New South Wales v Lepore*[36] had failed to provide a majority view concerning the question of vicarious liability in the case of an intentional tort, and that it was time for the court to revisit this question.

Policy

If the law on vicarious liability is moving (and it clearly is), we need to consider first the underlying policies that the courts are seeking to achieve. Yet pinning these policies down with precision is not an easy task. In a leading decision in New Zealand, Tipping J remarked that the literature was replete with comments concerning the lack of any coherent or agreed jurisprudential underpinning.[37] Indeed, the courts have tended to assert that the policy basis of vicarious liability lies in a combination of loss-spreading, deterring behaviour likely to cause harm and, broadly, the justice of the case at hand

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Maga v Archbishop of Birmingham [2010] All ER (D) 141 (Mar); [2010] 1 WLR 1441; [2010] EWCA Civ 256 a priest in charge of a presbytery owed a duty to take care to protect a vulnerable boy from sexual abuse committed by one of the priests living at the presbytery, and the defendant archdiocese was vicariously liable in respect of both wrongdoers. And see *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 at [92]–[122] (failure by elders of Jehovah's Witnesses to protect child from abuse when they knew of wrongdoer's earlier abuse of another child).

32 [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 at [19] (*Christian Brothers*); P Morgan, 'Vicarious Liability on the Move' (2013) 129 *LQR* 139; Rt Hon Lord Hope of Craighead, 'Tailoring the Law on Vicarious Liability' (2013) 129 *LQR* 514; J Bell, 'The Basis of Vicarious Liability' (2013) 72 *CLJ* 17.

33 [2016] AC 660; [2016] 2 WLR 806; [2016] ICR 470; [2016] UKSC 10 at [1] (*Cox*).

34 [2016] AC 677; [2016] 2 WLR 821; [2016] ICR 485; [2016] UKSC 11 (*Mohamud*).

35 [2016] HCA 37; BC201608462 (*Prince Alfred*).

36 (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 (*Lepore*); see below n 72 and accompanying text.

37 *S v Attorney-General* [2003] 3 NZLR 450; [2003] BCL 758; [2003] NZCA 149; BC200361128 at [107].

rather than the result of any clearly developed and logical legal principle.[38] The recent decisions in the United Kingdom all tend to illustrate this proposition.

In the *Christian Brothers* case,[39] Lord Phillips said that the policy objective underlying vicarious liability was to ensure, insofar as it was fair, just and reasonable, that liability for tortious wrong was borne by a defendant with the means to compensate the victim. Such defendants could usually be expected to insure against the risk of such liability, so that this risk was more widely spread. It was for the court to identify the policy reasons why it was fair, just and reasonable to impose vicarious liability and to lay down the criteria that had to be shown to be satisfied in order to establish vicarious liability. Where the criteria were satisfied the policy reasons for imposing the liability should apply. His Lordship considered that there was no difficulty in identifying a number of policy reasons that usually made it fair, just and reasonable to impose vicarious liability on an employer where an employee committed a tort in the course of his employment. They were: (i) the employer was more likely to have the means to compensate the victim than the employee and could be expected to have insured against that liability; (ii) the tort would have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity was likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity would have created the risk of the tort committed by the employee; (v) the employee would, to a greater or lesser degree, have been under the control of the employer. Importantly, his Lordship subsequently added that where the defendant and the tortfeasor were not bound by a contract of employment, but their relationship had the same incidents, that relationship could properly give rise to vicarious liability on the ground that it was 'akin to that between an employer and an employee'.

In *Cox* Lord Reed discussed and commented on these views.[40] He maintained that the five factors which Lord Phillips mentioned were not all equally significant. The first — the defendant's means and the likelihood he was insured — did not feature in the remainder of the judgment and was unlikely to be of independent significance in most cases, for neither was a principled justification.[41] The mere possession of wealth was not in itself any ground for imposing liability. As for insurance, employers insured themselves because they were liable: they were not liable because they had insured themselves. The significance of the fifth of the factors — the employer's

38 A seminal discussion is that of McLachlin CJ in the Supreme Court of Canada in *Bazley v Curry* [1999] 2 SCR 534 (*Bazley*); P Cane, 'Vicarious Liability for Sexual Abuse' (2000) 116 *LQR* 21; R Townshend-Smith, 'Vicarious Liability for Sexual (and other) Assaults' (2000) 8 *TLR* 108; N des Rosiers, 'From Precedent to Prevention — Vicarious Liability for Sexual Abuse' (2000) 8 TLR 27; P Giliker, 'Rough Justice in an Unjust World' (2002) 65 *MLR* 269.

39 [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 at [34]–[35], [47].

40 *Cox* [2016] AC 660; [2016] 2 WLR 806; [2016] ICR 470; [2016] UKSC 10 at [19]–[24].

41 It is notable that in *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 the claimants certainly had a good claim against an insured defendant, and the question was whether that defendant could recover a contribution from another insured defendant: see below nn 47 and 61 and accompanying text.

control over the tortfeasor — was that the defendant could direct what the tortfeasor did, not how he did it. So understood, it was a factor which was unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability.

Lord Reed said that the remaining factors — (1) activity by the tortfeasor on behalf of the defendant; (2) which was likely to be part of the business activity of the defendant; (3) which would have created the risk of the tort being committed — were interrelated. The first had been reflected historically in explanations of the vicarious liability of employers based on deemed authorisation or delegation. The second contemplated that, since the employee's activities were undertaken as part of the activities of the employer and for its benefit, it was appropriate that the employer should bear the cost of harm wrongfully done by the employee within the field of activities assigned to him. The third factor was very closely related to the second: since the risk of an individual behaving negligently, or indeed committing an intentional wrong, was a fact of life, anyone who employed others to carry out activities was likely to create the risk of their behaving tortiously within the field of activities assigned to them. The essential idea was that the defendant should be liable for torts that might fairly be regarded as risks of his business activities, whether they were committed for the purpose of furthering those activities or not. *Christian Brothers* wove together these related ideas so as to develop a modern theory of vicarious liability.

It is apparent from this brief account that the core policy favouring the imposition of vicarious liability and identified in *Christian Brothers* and *Cox* is founded on the defendant's business or activity having created the risk of the harm, rendering it just that the defendant should pay for it. We will be considering in more detail quite what is contemplated by this notion of risk and, in particular, how it protects vulnerable people. Furthermore, and crucially, that policy can be seen as driving the expansion in the reach of vicarious liability that was achieved in *Christian Brothers* and applied in *Cox*. It also tends to promote a coming together or fusion of the orthodox requirements for the imposition of vicarious liability, viz, establishing (i) the kind of relationship between the defendant and the wrongdoer; and (ii) the kind of link between that relationship and the conduct of the wrongdoer, which are necessary to found such liability.

How, then, did *Christian Brothers* move the law forward? It did so in three critical respects.[42] First, the orthodox relationship founding vicarious liability is, of course, that between an employer and an employee, and *Christian Brothers* extended the law by including relationships 'analogous to employment'. Second, leading authority in the UK took the view that only one defendant could be vicariously liable for a tortious act, but *Christian Brothers* accepted and applied the concept of dual vicarious liability. Third, the earlier

42 As will be explained, in all three respects the movements in the law achieved in *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 were foreshadowed by earlier movements in the law in Canada.

decision of the House of Lords in *Lister v Hesley Hall Ltd*[43] had supported replacing, at least for some cases, the 'course of employment' test used in establishing the requisite link between the employment and the tortious conduct with a test asking whether there was a 'close connection' between the relationship and the wrong, and *Christian Brothers* affirmed the use of that test. We will deal with all three developments and will give special attention to the third.

Relationships analogous to employment

The core of the doctrine of vicarious liability traditionally has involved commercial employers being held liable for negligence by their employees that is committed in the course of employment. But the new developments have been driven by cases involving child abuse committed by priests in circumstances where the defendant being sued was not their employer and, significantly, where the plaintiff was vulnerable to suffering that abuse. In *Doe v Bennett*[44] a Roman Catholic priest had sexually assaulted boys in his parishes, and the question was whether the diocesan episcopal corporation sole, which was equated with the bishop, was vicariously liable. The Supreme Court of Canada held that the relationship between a bishop and a priest in a diocese was 'akin to an employment relationship', and also that the necessary connection between the employer-created or enhanced risk and the wrong was established. *E v English Province of Our Lady of Charity*[45] is a similar decision of the Court of Appeal in England. Ward LJ expressed the test to be whether the tortfeasor bore a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant required the court to extend vicarious liability to cover the tortfeasor's wrongdoing. On the facts this test was satisfied. The tortfeasor was a priest for the parish in which the children's home where the plaintiff lived was situated. He was accountable to the bishop, was subject to the bishop's sanction, including removal from the parish, and was fully integrated into the organisation of the church, pursuing its fundamental aims and objectives on its behalf.

By this decision the Court of Appeal took the first step in creating a new, overarching, category of vicarious liability. Indeed, the logical next step might be to focus on the substantive characteristics of a relationship which justifies and attracts vicarious liability, excising the need to ask whether there is a contract of employment or something akin to it.[46] In *Christian Brothers*,[47] decided shortly afterwards, the Supreme Court did not follow this route, but it did confirm and develop the thinking in *E v English Province*. The question here was whether the Institute of the Brothers of the Christian Schools (the

43 [2002] 1 AC 215; [2001] 2 All ER 769; [2001] 2 WLR 1311; [2001] UKHL 22 (*Lister*); see below n 69.

44 (2004) 236 DLR (4th) 577; [2004] 1 SCR 436; 2004 SCC 17.

45 [2013] QB 722; [2012] 1 All ER 723; [2012] 2 WLR 709; [2011] EWHC 2871 (QB) (*E v English Province*); J O'Sullivan, 'The Sins of the Father — Vicarious Liability Extended' (2012) 71 *CLJ* 485; D Tan, 'A Sufficiently Close Relationship Akin to Employment' (2013) 129 *LQR* 30.

46 O'Sullivan, ibid, at 487.

47 [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56.

Institute), founded by Jean-Baptiste De La Salle in 1680, was responsible for sexual and physical abuse of children committed by its brothers at a residential institute for boys (St William's) who were in need of care and protection. Claims had been brought by the victims against two groups of defendants. The first (called the Middlesbrough defendants), who were the managers of the school and the employers of the brother teachers, were held at first instance to be vicariously liable in respect of abuse by those teachers. The second (the Institute defendants) were found not to be vicariously liable, on the basis that the Institute did not employ the brothers at St William's. Rather, it sent its brothers to teach there. The Court of Appeal upheld the judge's decision,[48] and the Middlesbrough defendants appealed, on the ground that the Institute should share joint vicarious liability for the acts of its brother members. The Supreme Court was unanimous in upholding this contention.

Lord Phillips (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnworth agreed) explained first how the Institute operated.[49] Its members were bound by lifelong vows of poverty, chastity and obedience and lived a communal life together as brothers, following a strict code of conduct. The Institute's mission was to provide a Christian education to boys, and in pursuance of that activity it owned and managed schools in which its members taught, and it sent its members to teach at schools managed by other bodies (as was the case with St William's). The brothers renounced any salaries payable for their teaching, which were instead paid to charitable trusts for the benefit of the Institute and used to meet the needs of the brothers and the financial requirements of the teaching mission. The Institute itself was not itself a corporate body, but the trusts through which it operated had recognised legal personality, and in the circumstances Lord Phillips saw it as appropriate to approach the case as if the Institute were incorporated, able to own property and possessing substantial assets.

On these findings his Lordship was satisfied that the relationship between the defendant and the tortfeasor had the same incidents as that of a contract of employment and could properly give rise to vicarious liability, on the ground that it was 'akin to that between an employer and an employee'.[50] That was the approach adopted by the Court of Appeal in *E v English Province*. And in the instant case the relationship between the teaching brothers and the Institute had all the essential elements of the relationship between employer and employee: the Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body; the teaching activity of the brothers was undertaken because the provincial head directed the brothers to undertake it; the teaching activity undertaken by the brothers also was in furtherance of the objective, or mission, of the Institute; and the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules. The relationship between the teacher brothers and the Institute differed from that of the relationship between

48 *Various Claimants v Catholic Child Welfare Society* [2010] All ER (D) 241 (Oct); [2010] EWCA Civ 1106; P Giliker, 'Taking Vicarious Liabiliy to the Brink: Vicarious Liability in the English Court of Appeal' (2011) 19 *TLJ* 76.

49 *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 at [8]–[10], [32]–[33].

50 Ibid, at [47], [56]–[58].

employer and employee in that the brothers were bound to the Institute not by contract, but by their vows, and the brothers entered into deeds under which they were obliged to transfer all their earnings to the Institute, but neither difference was material. Indeed, they rendered the relationship closer than that of an employer and its employees.[51]

Let us turn now to *Cox*.[52] The question in this case was whether the UK Ministry of Justice could be held vicariously liable for the negligence of a prisoner assisting with work in the prison kitchen who dropped a heavy bag of rice onto the prison catering manager and injured her. Here, then, the wrongdoer was not an employee of the prison authority. Lord Reed affirmed that the general approach in *Christian Brothers* was not confined to some special category of cases, such as the sexual abuse of children.[53] By focusing upon the business activities carried on by the defendant and their attendant risks, it directed attention to the issues which were likely to be relevant in the context of modern workplaces, where workers might in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflected prevailing ideas about the responsibility of businesses for the risks which were created by their activities. It extended the scope of vicarious liability, but not to the extent of imposing such liability where a tortfeasor's activities were entirely attributable to the conduct of a recognisably independent business of his own or of a third party. That extension enabled the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which might be motivated by factors which had nothing to do with the nature of the enterprises' activities or the attendant risks.

Lord Reed said also that it not necessary that the defendant be carrying on activities of a commercial nature: it was sufficient that the defendant be carrying on activities in the furtherance of its own interests.[54] The individual for whose conduct it might be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities to him, have created a risk of his committing the tort. A wide range of circumstances could satisfy those requirements.

Applying this approach, Lord Reed was satisfied that the requirements laid down in the *Christian Brothers* case were met and that the ministry was vicariously liable.[55] The prison service carried on activities in furtherance of its aims. The fact that those aims were not commercially motivated, but served the public interest, was no bar to the imposition of vicarious liability. Prisoners working in the prison kitchens were integrated into the operation of the prison,

51 See also *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722, applying *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 to cover the elders and ministerial servants of congregations of the Jehovah's Witnesses.

52 [2016] AC 660; [2016] 2 WLR 806; [2016] ICR 470; [2016] UKSC 10; P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 *CLJ* 202.

53 *Cox*, ibid, at [29].

54 Ibid, at [30].

55 Ibid, at [32]–[44].

so that the activities assigned to them by the prison service formed an integral part of the activities which it carried on in the furtherance of its aims: in particular, the activity of providing meals for prisoners. They worked under the direction of prison staff in a position where there was a risk that they might commit a variety of negligent acts within the field of activities assigned to them. The activities assigned to them were not merely of benefit to themselves. Their activities formed part of the operation of the prison, and were of direct and immediate benefit to the prison service itself.

For present purposes it is sufficient to emphasise two things. First, *Cox* has affirmed that the question whether the relationship between the defendant and the wrongdoer is analogous to that between an employer and an employee may be asked in any case: it is not confined to sexual abuse or similar cases. But second, a court is likely to find such a relationship in many or most cases where the defendant has been instrumental in placing the tortfeasor in a position where he or she is able to exercise significant power or influence over the victim. In the very nature of things the defendant will necessarily have had influence and control in respect of the wrongdoer having acquired that position of power vis-à-vis the victim. And as will be explained, a position involving such power is a key factor in finding a close connection between the defendant's relationship with the wrongdoer and the tortious conduct involved. The 'analogous to employment' test thus is particularly well suited for giving a remedy for those who are especially vulnerable to the wrongdoer's misuse of his or her position.

Dual vicarious liability

A key issue in the *Christian Brothers* case that the Supreme Court needed to consider before it could determine the claim against the De La Salle Institute was whether dual vicarious liability could be imposed on both the Middlesbrough defendants and the Institute. The background to this inquiry lay in early cases concerning borrowed servants, notably *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd*,[56] which proceeded on the basis that only one employer could be vicariously liable for a tortious act and which it was turned on which had the ultimate power and control over the employee concerned. But two decisions in 2005 — *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[57] in England and *Blackwater v Plint*[58] in Canada — accepted that it was possible in law to have dual vicarious liability. In *Viasystems* May LJ, applying *Mersey Docks*, held that the inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. 'Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done?'[59] Entire or absolute control was not a necessary precondition, and dual control and thus dual

56 [1947] AC 1 (*Mersey Docks*).

57 [2006] QB 510; [2005] 4 All ER 1181; [2006] 2 WLR 428; [2005] EWCA Civ 1151 (*Viasystems*); R Stevens, 'A Servant of Two Masters' (2006) 122 *LQR* 201.

58 [2005] 3 SCR 3; 2005 SCC 58.

59 *Viasystems* [2006] QB 510; [2005] 4 All ER 1181; [2006] 2 WLR 428; [2005] EWCA Civ 1151 at [16].

vicarious liability was possible. Rix LJ took a rather different approach.[60] He noted that the courts had imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant, and questioned whether vicarious liability was to be equated with control. Rather, what one was looking for was a situation where the employee in question was so much part of the work, business or organisation of both employers that it was just to make both employers answer for his negligence.

In *Christian Brothers,* Lord Phillips approved the decision in *Viasystems* and applied it to the facts of the case.[61] He noted that the brothers who taught at St William's were not contractually employed by the Institute; rather, they were employed by or on behalf of the Middlesbrough defendants. But dual liability could be imposed. Where two defendants were potentially vicariously liable for the act of a tortfeasor it was necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant was vicariously liable. And in considering that question in relation to each defendant, the approach of Rix LJ was to be preferred to that of May LJ.

In *Cox*, Lord Reed observed that a lesson to be drawn from these recent cases was that defendants could not avoid vicarious liability on the basis of technical arguments about the employment status of the individual who committed the tort. What weighed with the courts in *E v English Province* and *Christian Brothers* was that the abusers were placed by the organisations in question, as part of their mission, in a position in which they committed a tort whose commission was a risk inherent in the activities assigned to them.[62] So the approach taken to cases of dual vicarious liability reinforces the argument already advanced, that finding a relationship between the parties that can support the imposition of vicarious liability and finding a close connection between that relationship and the wrongdoing, are intimately related inquiries, and both tend to operate to protect those who are particularly vulnerable to suffering harm at the hands of the wrongdoer.

The close connection test

The classic approach to the question whether there is a sufficient link between an employer and the tort of his or her employee so as to make the employer vicariously liable is elaborated in the first edition of *Salmond on Torts* and has become known as the 'Salmond test'.[63] It must be asked whether the wrongful act was committed 'in the course' or 'within the scope' of employment,[64] with the relevant act being 'either (a) a wrongful act authorised by the master, or

60 Ibid, at [64], [79].

61 *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 at [40]–[45].

62 *Cox* [2016] AC 660; [2016] 2 WLR 806; [2016] ICR 470; [2016] UKSC 10 at [31], citing Bell, above n 32, for this proposition.

63 See J W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, Stevens and Haynes, 1907, pp 83–4.

64 Salmond used these expressions interchangeably, and while the former subsequently gained the greatest currency the latter arguably is less restrictive, and, as will be seen, reflects recent developments.

(b) a wrongful and unauthorised *mode* of doing some act authorised by the master'. The second limb is amplified by the proposition that a master is liable for acts which he has not authorised if they are 'so connected with acts which he has authorised, that they may rightly be regarded as modes — although improper modes — of doing them'.

The first limb of this test may provide a means of establishing vicarious liability for agents who are not employees, or constitute a form of accessory liability. The second limb raises the problem of deciding whether conduct is an unauthorised mode of doing something or simply is not authorised at all. While the test is reasonably workable where an employee is alleged to have been negligent during his or her employment, there is obvious difficulty in finding that it can be satisfied in cases where an employee has engaged in deliberate wrongdoing for his or her own benefit. Indeed, it would be impossible to satisfy in the context of claims alleging sexual abuse by employees or persons in analogous positions: such conduct must be the very antithesis of what the person concerned would be expected to do. Unless all such claims are to fail another approach needs to be taken.

The judgment of McLachlin J in the Supreme Court of Canada in *Bazley*[65] introduced a different and a more satisfactory approach. Her Honour maintained that vicarious liability was generally appropriate where there was a significant connection between the creation or enhancement of a risk and the wrongful act, even if unrelated to the employer's desires. Relevant factors might include the opportunity that the enterprise afforded the employee to abuse his or her power; the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; the extent of power conferred on the employee in relation to the victim; and the vulnerability of potential victims to wrongful exercise of the employee's power.

Applying these principles to the particular facts, it was held that a foundation operating residential care facilities for troubled children was vicariously liable for paedophilic assaults by a caregiving employee. There was a strong connection between the role that the employee was required to carry out and the opportunities to commit the wrongful acts. The employee's duties included general supervision and also intimate activities like bathing and putting the children to bed, and in these circumstances the employer was seen as having created or enhanced the risk of his sexual wrongdoing. By contrast, in *Jacobi v Griffiths*,[66] another decision of the Supreme Court delivered on the same day as *Bazley*, it was held that a children's club was not vicariously liable for sexual abuse by an employee away from the club premises and outside working hours. The employment gave the opportunity to commit the assaults, but the employee was not placed in a special position of trust with regard to 'care, protection and nurturing', and the actual work

65 [1999] 2 SCR 534 at 559–60.
66 (1999) 174 DLR (4th) 71; [1999] 2 SCR 570 (*Jacobi*).

created no special risk of wrongdoing.[67] A number of other decisions of the same court seek to draw this line.[68]

In *Lister*,[69] where the House of Lords considered *Bazley* for the first time, it was held unanimously that the owners and managers of a school, as employer, were vicariously liable for sexual abuse committed by one of their employees, who was the warden of a boarding house. *Bazley* was treated not as laying down some new principle but as a clarifying elaboration of the second limb to the Salmond test. Lord Steyn, whose judgment referred to *Bazley* and *Jacobi* as 'luminous and illuminating', noted that the 'close connection' test was itself based on the Salmond test requiring that the relevant act be a mode — albeit an improper mode — of an authorised act. His Lordship thought that the appropriate question was whether the acts in question were 'so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable'. The focus was on whether vicarious liability should result from the relative closeness of the misconduct to the nature of the employment, and in the instant case the sexual abuse was 'inextricably interwoven' with the carrying out by the warden of his duties at the school. Lord Millett also referred with approval to the Canadian decisions and recognised that it was critical that attention be directed to the closeness of the connection between the employee's duties and his wrongdoing. Experience showed that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there was an inherent risk that indecent assaults on the residents would be committed by those placed in authority over them, particularly if they were in close proximity to them and occupying a position of trust.

All members of the court in *Lister* agreed that the test of 'close connection'

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67 In *Bazley*, the Supreme Court declined to make an exception for non-profit organisations. In *Jacobi*, however, the court recognised that the policy consideration of compensation has considerably restricted application where the employer has little or no ability to absorb the cost of no-fault liability. For consideration of vicarious liability and volunteers, see P Morgan, 'Recasting Vicarious Liability' (2012) 71 *CLJ* 615.

68 *Doe v Bennett* (2004) 236 DLR (4th) 577; [2004] 1 SCR 436; 2004 SCC 17 (diocesan episcopal corporation sole vicariously liable where abuse by priest strongly related to psychological intimacy inherent in priest's role and where power conferred on abuser relative to his victims in geographically isolated and devoutly religious community); *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45; 2005 SCC 60 (no special risk arising from job-created power in case of sexual abuse by school employee with no supervisory or child care duties); *Blackwater v Plint* [2005] 3 SCR 3; 2005 SCC 58 (Government of Canada and a Canadian church operating a residential school for aboriginal children under an informal partnership held jointly vicariously liable for a dormitory supervisor who had sexually assaulted children at the school); J W Neyers, 'Joint vicarious liability in the Supreme Court of Canada' (2006) 122 *LQR* 195; *Reference Re Broome v Prince Edward Island* [2010] 1 SCR 360; 2010 SCC 11 (no sufficiently close connection between a provincial government and a privately managed children's home as to give rise to vicarious liability).

69 [2002] 1 AC 215; [2001] 2 All ER 769; [2001] 2 WLR 1311; [2001] UKHL 22; B Feldthusen, 'Vicarious Liability for Sexual Abuse' (2001) 9 *TLR* 173; P Giliker, 'Rough Justice in an Unjust World' (2002) 65 *MLR* 269; Ter Kah Leng, 'Vicarious Liability for Intentional Wrongdoing' (2002) 18 *PN* 2; A Todd, 'Vicarious Liability for Sexual Abuse' (2002) 8 *Canta LR* 281; P Giliker, 'Making the Right Connection: Vicarious Liability and Institutional Responsibility' (2009) 17 *TLJ* 35.

should be applied, but only Lord Millett endorsed the importance that the Canadian decisions attached to the creation of risk. In *Christian Brothers* the Supreme Court took the further step and held that there needed to be proof that the defendant caused a material increase in the risk that abuse would occur. In Lord Phillips's words:

> Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.
>
> These are the criteria that establish the necessary 'close connection' between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.[70]

In the instant case the close connection between the relationship between the brothers and the Institute and the abuse committed at the school was made out. The relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. So there was a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school. Living cloistered on the school premises were boys who were vulnerable because they were children in the school, because they were virtually prisoners, and because their personal histories made it very unlikely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the Institute that gave rise to vicarious liability on the part of the latter. It was not a borderline case. It was one where it was fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough defendants vicarious liability for the abuse committed by the brothers.[71]

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70 *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 at [86]–[87].

71 The close connection test also has been applied where the link was more tenuous. In *Maga v Archbishop of Birmingham* [2010] All ER (D) 141 (Mar); [2010] 1 WLR 1441; [2010] EWCA Civ 256 (see J Bell, 'Vicarious Liability for Sexual Abuse' (2010) 69 *CLJ* 440; P Morgan, 'Distorting Vicarious Liability' (2011) 74 *MLR* 932; L Hoyano, 'Ecclesiastical Responsibility for Clerical Wrongdoing' (2010) 18 *TLR* 154; P Giliker, 'Lister revisited: Vicarious Liability, Distributive Justice and Course of Employment' (2010) 126 *LQR* 521) a claim was brought against the Birmingham Archdiocese of the Roman Catholic Church in respect of sexual abuse committed by a priest upon the claimant when a boy. The Court of Appeal held unanimously that vicarious liability was established. Various reasons were given, including 'a degree of general moral authority' vested in the priest by the church: at [45]. Yet it is hard to see that the relationship between them had a close connection with the

The decision of the High Court of Australia in *Lepore*[72] was out of step with these developments. In this case Gleeson CJ and Kirby J, relying on *Bazley* and *Lister*, were prepared to accept that an institution might be held vicariously liable for sexual abuse committed by a teacher. However, the other members of the court took different and contrasting views. Gaudron J considered that the only principled basis upon which vicarious liability could be imposed for deliberate criminal conduct was that the defendant was estopped from asserting that the person whose acts were in question was not acting as his or her servant, agent or representative when the acts occurred. Gummow and Hayne JJ, in a joint judgment, considered that recovery against the employer in the case of an intentional tort should be limited to where the conduct was done in the intended pursuit of the employer's interests or the apparent execution of the authority which the employer held out the employee as having, and there was not the slightest semblance of proper authority to sexually assault a pupil.[73] Callinan J thought that claims of abuse had to fail because deliberate criminal misconduct lay outside, and usually far outside, the scope or course of an employed teacher's duty. However, an alternative analysis favoured by McHugh J was that sexual abuse by a teacher of a child amounted to a breach of a non-delegable duty owed by the institution to the child. We will be returning to this last question.

In *Prince Alfred*[74] the High Court of Australia recognised that, as a result of the differing views expressed in *Lepore*, there was a need for some guidance to be provided to lower courts so as to reduce the risk of unnecessary appeals arising out of its uncertainties. French CJ, Kiefel, Bell, Keane and Nettle JJ, in a joint judgment,[75] noted that recent decisions in Canada and the United Kingdom had developed tests for imposing vicarious liability which had regard to the connection between the wrongful act concerned and the employment and, in the United Kingdom, to what a judge determined to be fair and just. These new tests of connection were devised not only to provide an explanation for cases of the kind to which they were initially addressed — involving the sexual abuse of children in educational, residential or care facilities by employees having special positions with respect to the children — but also to serve as a basis for vicarious liability which might apply more generally. But general principle of that kind depended upon policy choices and the allocation of risk, which were matters upon which minds might differ. An acceptable general basis for liability had eluded the common law of Australia,

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acts of abuse. The claimant was not a Roman Catholic and did not engage with the priest on a religious level. The 'grooming' that preceded the abuse occurred in the course of youth work carried on by the priest for the benefit of Catholics and non-Catholics alike. The case looks like one where the wrongdoer's position as priest gave him the opportunity to commit the abuse, but no more than that.

72 (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126.

73 C Beuermann, *Strict Liability for the Wrongdoing of Another in Tort*, PhD Thesis, Australian National University, 2012, argues that authority is significant because of the potential it provides for abuse. The potential exists because of the risk that an employer will abuse his or her authority by creating a conflict between a person's duties as employee and a person's duties under the general law. There is no real potential if the person's conduct is intentional or wilful, and thus, on this view, no basis for imposing vicarious liability.

74 [2016] HCA 37; BC201608462.

75 Gageler and Gordon JJ delivered a brief concurring judgment.

and it was well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnished a solution to further cases as they arose. This had the advantage of consistency in what might, at some time in the future, develop into principle. And it had the advantage of being likely to identify factors which pointed toward liability and by that means provided explanation and guidance for future litigation.

On this approach, their Honours considered that the key was to be found in the words of Dixon J in *Deatons Pty Ltd v Flew*,[76] that vicarious liability might arise where the employment provided the 'occasion' for the wrongful act.[77] The fact that a wrongful act was a criminal offence did not preclude the possibility of vicarious liability. It was possible for a criminal offence to be an act for which the apparent performance of employment provided the occasion. Conversely, the fact that employment afforded an opportunity for the commission of the act was not of itself a sufficient reason to attract vicarious liability. Even so, the role given to the employee and the nature of the employee's responsibilities might justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it might be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee in relation to the victim.

Consequently, in cases of this kind, the court should consider any special role that the employer had assigned to the employee and the position in which the employee was thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role might be said to give the 'occasion' for the wrongful act, particular features might be taken into account. They included authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature might be especially important. Where, in such circumstances, the employee took advantage of his or her position with respect to the victim, that might suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

The instant case concerned a claim by a former pupil at the Prince Alfred College (PAC) in respect of the sexual abuse he suffered at the hands of a housemaster, one Bain, employed by PAC. The abuse had happened many years earlier, and after it came to light the claimant accepted a settlement of money offered by PAC. But after his psychiatric condition worsened and his financial situation became desperate he changed his mind and sought to have the limitation period for bringing an action extended. The High Court held that permission should not be granted, and also that no finding on liability could or should have been made due to deficiencies in the available evidence. The relevant approach required a careful examination of the role the PAC actually assigned to housemasters and the position in which Bain was placed vis-à-vis the claimant and the other children. Much of the evidence necessary to a determination had been lost, and the PAC would be prejudiced in various ways

76 (1949) 79 CLR 370 at 381; BC4900430.
77 *Prince Alfred* [2016] HCA 37; BC201608462 at [76], [79]–[82].

if it were required to defend an action at this late juncture.

Whether the distinction drawn by the High Court between the employment providing the 'occasion' for the abuse and the 'opportunity' for the abuse is a real one is doubtful. The words can be, and are, used interchangeably. The idea of a close connection based upon the creation of a risk is preferable, for it is clear that the nature of the abuser's job and the tasks he is given or authorised to carry out are pivotal in determining whether the test is satisfied. Yet the High Court certainly recognised that such employment-created risk was the focus of the inquiry, apparently seeing this as inherent in its favoured test. At all events the more substantial difference between the approach in Australia and the approach in the United Kingdom lies in the breadth of the application of the close connection test, and to this question we will now turn.

A close connection in non-sexual abuse cases

The discussion of the close connection test so far has concentrated on sexual abuse cases. In *Mohamud*[78] the UK Supreme Court applied the test in a quite different situation. The claimant, who was of Somali origin, inquired at the defendant's petrol station about printing documents from a USB stick, but the defendant's employee, who worked in the kiosk, abused him using foul, racist and threatening language. The claimant then returned to his car but the employee followed him and subjected him to a violent assault, ignoring instructions to stop by the employee's supervisor. The claimant sued the defendant employer seeking damages in respect of this unprovoked assault. The claim failed both at first instance and in the Court of Appeal,[79] and the claimant appealed to the Supreme Court.[80]

Lord Toulson, delivering the leading judgment, remarked that Salmond's formula had been cited and applied in many cases, sometimes by stretching it artificially; but even with stretching, it was not universally satisfactory.[81] The difficulties in its application were particularly evident in cases of injury to persons or property caused by an employee's deliberate act of misconduct. One line of argument was to ask whether an employee had been charged with keeping order, so that an assault by the employee could be described as an improper mode of performing the work. But the cases were conflicting and not entirely satisfactory, and his Lordship thought that it was more helpful to ask whether conduct was 'within the field of activities' assigned to the employee[82] or to ask 'what was the job on which [the employee] was engaged for his

78 [2016] AC 677; [2016] 2 WLR 821; [2016] ICR 485; [2016] UKSC 11; Morgan, above n 52.

79 *Mohamud v WM Morrison Supermarkets Plc* [2014] 2 All ER 990; [2014] ICR D19; [2014] IRLR 386; [2014] EWCA Civ 116.

80 The claimant died from an unrelated illness before his appeal was heard.

81 *Mohamud* [2016] AC 677; [2016] 2 WLR 821; [2016] ICR 485; [2016] UKSC 11 at [26]–[39]. His Lordship was critical of *Deatons Pty Ltd v Flew* (1949) 79 CLR 370; BC4900430 and *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 2 All ER 700; [1974] 1 WLR 1082, both declining liability. He preferred the result, although not necessarily the reasoning, in *Petterson v Royal Oak Hotel Ltd* [1948] NZLR 136, allowing the claim.

82 Citing *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Coompany* 1925 SC 796 at 802 per Lord Cullen.

employer?'.[83] At all events he considered that in *Lister* the Salmond formula was stretched to breaking point, for even on its most elastic interpretation the sexual abuse of the children could not be described as a mode, albeit an improper mode, of caring for them. Lord Steyn had posed the broad question whether the warden's torts was so closely connected with his employment that it would be just to hold the employers liable, and concluded that the employers were vicariously liable because they undertook the care of the children through the warden and he abused them. There was therefore a close connection between his employment and his tortious acts. To similar effect, Lord Clyde had said that the warden had a general duty to look after the children, and the fact that he abused them did not sever the connection with his employment; his acts had to be seen in the context that he was entrusted with responsibility for their care, and it was right that his employers should be liable for the way in which he behaved towards them as warden of the house.

Lord Toulson recognised that the court in *Lister* was mindful of the risk of over-concentration on a particular form of terminology, and thought there was a similar risk in attempting to overrefine, or lay down a list of criteria for determining, what precisely amounted to a sufficiently close connection to make it just for the employer to be held vicariously liable.[84] Simplification of the essence was more desirable. Taking this approach, the court had to consider two matters. The first question, to be addressed broadly, was what functions or 'field of activities' had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. Second, the court had to decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable as a matter of social justice. The cases in which the necessary connection had been found were cases in which the employee used or misused the position entrusted to him in a way which injured the third party.

In the instant case it was the employee's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul mouthed way and ordering him to leave was inexcusable but within the 'field of activities' assigned to him. What happened thereafter was an unbroken sequence of events. Following the claimant to the forecourt was all part of a seamless episode. Further, when the employee again told the claimant in threatening words that he was never to come back to the petrol station, this was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it was just that as between them and the claimant, they should be held responsible for their employee's abuse of it. The employee's motive was irrelevant. It looked obvious that he was motivated by personal racism rather

83 Citing *Rose v Plenty* [1976] 1 All ER 97 at 102; [1976] 1 WLR 141 at 147–8 per Scarman LJ.

84 *Mohamud* [2016] AC 677; [2016] 2 WLR 821; [2016] ICR 485; [2016] UKSC 11 at [43]–[47].

than a desire to benefit his employer's business, but that was neither here nor there.

Lord Dyson also was happy with the 'close connection' test.[85] He recognised that it was imprecise. But this was an area of the law in which imprecision was inevitable. To search for certainty and precision in vicarious liability was to undertake a quest for a chimaera. Many aspects of the law of torts were inherently imprecise, such as the concepts of fairness, justice and reasonableness which were central to the law of negligence. The second limb of the Salmond test was not effective for determining the circumstances in which it was just to hold an employer vicariously liable for committing an act not authorised by the employer, and the necessary improvement in the law was achieved by the simple expedient of explicitly incorporating the concept of justice into the close connection test.

No doubt their Lordships are correct in drawing attention to the uncertainties. The wider approach seems to ask whether, in some fairly broad sense, the employee (or person in an analogous position) is in fact performing his or her employment or similar task at the time of the wrongful act and whether there is a connection with the task beyond the mere coincidence of time and place which meant that the wrongful act happened to occur at the workplace. We might ask whether the employment created a risk of 'this sort of thing'. The inquiry has some affinity with the question whether conduct can be said to be the cause of loss where it is precipitated by an intervening act or event. As has been judicially remarked, there is a material, and crucial, distinction between causing a loss and providing the opportunity for its continuance.[86] A helpful method of approach in drawing this distinction is to ask whether the plaintiff's loss is within the scope of the risk created by the defendant's conduct.[87] In the present context we must ask whether the employment or task created the risk of the conduct: and in *Mohamud* the Supreme Court held that it did because the employment involved dealing with customers and the assault occurred as part of that dealing. However, in *Prince Alfred*[88] the High Court of Australia rejected the decision, because the role assigned to the employee in that case did not provide the occasion for the wrongful acts which the employee committed outside the kiosk on the forecourt of the petrol station. What occurred after the victim left the kiosk was relevantly unconnected with the employee's employment.

We can perhaps agree with the High Court on this point. It is hard to see the racist assault as being connected with the wrongdoer's employment. The Supreme Court emphasised that what occurred was a 'seamless' series of events, but the whole episode, including the initial encounter in the kiosk, very

85 Ibid, at [53]–[56].

86 *Price Waterhouse v Kwan* [2000] 3 NZLR 39 at [28] per Tipping J.

87 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; [2002] 3 All ER 209; [2002] 2 WLR 1353; [2002] UKHL 19 at [71] per Lord Nicholls; and see *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; 176 ALR 411; [2000] HCA 61; BC200007093 at [38]–[40]; *Pledge v Roads and Traffic Authority* (2004) 205 ALR 56; 40 MVR 289; [2004] HCA 13; BC200400863 at [9]–[10]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 683; *Sherwin Chan & Walshe Ltd (in liq) v Jones* [2013] 1 NZLR 166; [2012] NZCA 474 at [36]–[38].

88 [2016] HCA 37; BC201608462 at [83].

arguably was attributable simply to the employee's racism, not his employment. Let us change the facts and suppose the employee saw a Somali man passing in the street and ran out and assaulted him for racist reasons. The result seemingly would have been different, yet there does not appear to be any substantive difference as regards the connection with his employment. As it stands the decision in *Mohamud* seems apt, or at least has the potential, to render an employer liable for anything an employee may do at work and on the employer's premises.

This is not to say that the close connection test must be narrowly based, applying only to abuse or analogous cases. Rather, it can apply generally to situations involving intentional misconduct and, indeed, to cases of negligence. Asking whether there is a 'close connection' between a certain relationship and the tortious conduct of a party to that relationship certainly can include the question whether the conduct occurred within the course or scope of the relationship. But let us focus on intentional conduct and consider how the test ought to be applied in the conjoined, and contrasting, decisions in *Weddall v Barchester Health Care Ltd*; *Wallbank v Wallbank Fox Designs Ltd*.[89] In *Weddall*, the manager of a care home phoned a junior employee at his home to offer him a voluntary extra shift, but the employee, having formed the impression that he was being mocked because he was drunk, cycled to the home and attacked the manager in a violent and unprovoked attack. In *Wallbank*, a director employed by the defendant, a small manufacturing company, spoke to an employee about shortcomings in his work and went to assist him, but the employee threw him onto a table and fractured his lower back. The Court of Appeal held that the claim of vicarious liability failed in the first case but succeeded in the second.

Pill LJ, delivering the main judgment (Moore-Bick and Aikens LJJ both agreeing), said that the essence of the appellants' cases was that, since employees had to receive instructions and respond to them, an improper form of response, even a violent one, was an act within the course of employment. Yet in *Weddall* the assault was an independent venture of the employee, separate and distinct from his employment at the care home. He was acting personally for his own reasons. The instruction, or request as in fact it was, was no more than a pretext for an act of violence unconnected with his work as a health assistant. However, in *Wallbank* the risk of an over-robust reaction to an instruction was a risk created by the employment. It might be reasonably incidental to the employment rather than unrelated to or independent of it. Not every act of violence by a junior to a more senior employee, in response to an instruction at the workplace, would be an act for which the employer was vicariously liable. But on the particular facts the doctrine of vicarious liability did provide the victim with a right of action against his employer.

Should the close connection test be seen as satisfied in either *Weddall* or *Wallbank*? The reasoning in *Mohamud*, irrespective of the actual decision, tells us that we should look to the field of activities entrusted to the employee and the link with or the kind of risk associated with that field. In *Wallbank* the factors that were regarded as relevant included the geographical and temporal proximity of the assault to the order. It may be argued that reliance on factors

89 [2012] IRLR 307; [2012] EWCA Civ 25.

such as these seems arbitrary, for they suggest that the position might be different if an employee developed resentment as a result of work orders but assaulted his superior away from the workplace. Yet maybe the decision would be the same, provided the link with work orders could be shown.[90] And maybe the test was not satisfied in *Weddall*, on the ground that the assault appeared to be motivated by personal resentment and that it lacked any sufficient link with the employment. Certainly, in a decision in Scotland,[91] an employer was not vicariously liable where an employee was murdered by a co-employee, for the field of employment did not create the risk of the murderous conduct.

Predicting the closeness of the connection between the relationship and the conduct on the facts of any particular case often will not be an easy task for lawyers, nor will determining it be easy for the courts. Some uncertainty in the application of the test is inevitable. However, in one respect at least the law is clearer and, maybe, more principled. The nature of the inquiry is very well suited to give a remedy in sexual abuse cases and other cases involving vulnerable claimants. As regards the former, the decisions emphasise that the risk of the abuse must arise out of the activities and duties entrusted to the wrongdoer: it is not enough that the activities and duties simply provided an opportunity for the abuse to occur. As regards the latter, and looking at the question more broadly, the relevant risk can most easily be seen to arise in circumstances where the victim is in a vulnerable position and, in particular, subject to the exercise of power by the wrongdoer. Indeed, we can also see this underlying theme in the different context of employees or agents vested with authority to effect legal relations on behalf of employers or principals or their clients.

Where an employee has been guilty of fraudulent wrongdoing which is intended only to benefit the employee, albeit carried out in the course of the employee's normal duties, once again there is a difficulty in such cases in finding that the wrongful conduct occurred in the course of employment. Yet the courts have consistently imposed vicarious liability on the employer. In *Lloyd v Grace, Smith & Co*,[92] the leading decision, an employee who was employed by a solicitor as a conveyancing manager, and who was vested with authority to arrange and negotiate sales of real property, fraudulently induced the plaintiff to convey her property to him. The plaintiff was under the impression that she was executing documents which were necessary to sell the properties on her behalf to others. The House of Lords held unanimously that the defendants were vicariously liable. Lord Macnaghten was satisfied, relying on earlier authority,[93] that the principles of agency could apply and that a principal who was an employer was liable for the fraud of his agent and employee committed in the course of the agent's employment and within his authority, whether the fraud was committed for the benefit of the principal or not.

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90 See, eg, *Mattis v Pollock* [2004] 4 All ER 85; [2003] 1 WLR 2158; [2003] EWCA Civ 887 (employer vicariously liable for aggressive doorman who left the premises and returned to stab the claimant near the club entrance).

91 *Vaickuviene v J Sainsbury Plc* [2013] CSIH 67.

92 [1912] AC 716.

93 *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259.

Lord Toulson discussed *Lloyd's* case in *Mohamud*,[94] observing that Lord Macnaghten recognised the difficulty of trying to give precise meaning to the expressions 'acting within his authority', 'acting in the course of his employment' and 'acting within the scope of his agency', and that whichever expression was used it had to be construed liberally. Lord Toulson himself said that although taking properties from the plaintiff was far removed from what the wrongdoer was employed to do, the justice of the decision was obvious. The wrongdoer was trusted both by his firm and by its client. They were each innocent, but one of them had to bear the loss, and it was right that it should be the employer. The firm employed the wrongdoer and placed him in a position to deal with the claimant; he abused that position and took advantage of her. It was fairer that the firm should suffer for the cheating by their employee than the client who was cheated.

It is immediately apparent that the vulnerability of the client can be seen as driving the decision. She was subject to the power of the fraudulent clerk and was obliged to trust him regarding the sale of her property and the execution of the necessary documents. And while it is difficult to see the conduct of the clerk as being within his authority or the scope of his employment, in recent cases the difficulty in finding the necessary link with the employment has been resolved by importing the close connection test. In *Dubai Aluminium Co Ltd v Salaam*[95] the House of Lords applied the *Lister* approach to vicarious liability in the case of commercial fraud. Lord Nicholls said that 'the wrongful conduct should be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful act might *fairly and properly be regarded* [original emphasis] as done by the partner while acting in the ordinary course of the firm's business or the employee's employment'.[96]

In *Nathan v Dollars & Sense Ltd*,[97] the leading case in New Zealand, the Supreme Court accepted that vicarious liability could apply to an agency relationship not involving employment, and applied the close connection test in determining the scope of liability. Here a borrower (R) sought to arrange a loan from a financier (D) to fund his business, with his parents' property being used as security. D's lawyer asked R to obtain his parents' signatures and to carry out other tasks in relation to the security on D's behalf. R forged his mother's signature, following which the mortgage was registered and the loan moneys advanced. R's business later was placed in liquidation, and D sought to enforce its security. The Supreme Court recognised that it could not be said that borrowers could never act as agents for lenders. Here R had been entrusted with the task of obtaining the signatures and was D's agent for that purpose, having been impliedly authorised to act in a representative capacity. Whether a principal was liable for an agent's conduct depended upon whether the conduct fell within the scope of the task the agent had been engaged to perform. There needed to be a sufficiently close connection between that task

94 [2016] AC 677; [2016] 2 WLR 821; [2016] ICR 485; [2016] UKSC 11 at [20]–[24].
95 [2003] 2 AC 366; [2003] 1 All ER 97; [2002] 3 WLR 1913; [2002] UKHL 48.
96 Ibid, at [23].
97 [2008] 2 NZLR 557; [2008] NZSC 20; S Watson and C Noonan, 'The Widening Gyre of Vicarious Liability' (2009) 17 *TLJ* 144; P Watts, 'Agency, Forgery and the Land Register' (2008) 124 *LQR* 529.

and the agent's unlawful act, so that the wrong could be seen as the materialisation of the risk inherent in the task. And on the facts the conduct was within the scope of the agency, even though the forgery was done exclusively for the benefit of the agent.

As the above discussion makes apparent, the vicarious liability of principals for the conduct of agents is determined in a similar way to that of employers or of those who are analogous to employers for the conduct of employees or persons in analogous positions. Vicarious liability is imposed because, broadly speaking, the employee or agent is acting in a representative capacity and performing his or her allocated tasks, albeit fraudulently.

Alleging a non-delegable duty

Let us consider a few basic points. A person who employs an independent contractor (who we will call the principal) is not liable for the independent contractor's negligence in the course of his or her work. The same policy considerations which underpin the vicarious liability of an employer for an employee's negligence, such as the requirements of efficiency, risk allocation and loss-spreading, are seen to justify the imposition of liability for the independent contractor's negligence squarely on the contractor concerned, who can pass on any relevant costs (such as insurance) in the price for the job. Of course, the principal may always breach a primary duty of care owed to others and arising from damage caused by the contractor's work. In this event, the principal will be liable as a joint tortfeasor. The clearest examples are cases where the principal hires an independent contractor to commit an act which is in itself tortious or intervenes to give the contractor a direct instruction which causes the damage. Or sometimes there may be a duty to control or to supervise.[98] Other examples arise where the principal should reasonably have foreseen that damage could occur when hiring an independent contractor who is known to the principal to be incompetent,[99] where the work involves specialised skill the principal should know the independent contractor does not possess,[100] or where the principal discovers the contractor carrying out work in a foreseeably injurious way and does nothing to prevent it.[101]

This brings us to the concept of a non-delegable duty, which tends to cut across the above principles. Since, in strict terms, a person under a duty to use care cannot delegate that duty to someone else,[102] the creation of a class of non-delegable duties seems to be self-contradictory.[103] However, the category is well established, if indeterminate, and is generally associated with relationships which give rise to a duty of care 'of a special and "more

98 See generally B S Markesinis, 'Negligence, Nuisance and Affirmative Duties of Action' (1989) 105 *LQR* 104.

99 *Ferguson v Welsh* (1987) 86 LGR 153; [1987] 3 All ER 777; [1987] 1 WLR 1553; [1988] IRLR 112.

100 *Wells v Cooper* [1958] 2 QB 265.

101 *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 at 209; [1988] 2 All ER 992 at 1008; (1988) 15 ConLR 35 at 59 per Lord Bridge.

102 For example, *Cassidy v Ministry of Health* [1951] 1 All ER 574 at 586; [1951] 2 KB 343 at 363 per Denning LJ.

103 G Williams, 'Liability for Independent Contractors' (1956) 14 *CLJ* 180.

stringent" kind, namely a "duty to ensure that reasonable care is taken"'.[104] In other words, non-delegable means that *legal* responsibility cannot be delegated, even if a task itself has been. In *Woodland v Essex County Council*,[105] Lord Sumption said that English law had long recognised that non-delegable duties exist, but did not have a single theory to explain when or why. However, his Lordship identified two broad categories of case in which such a duty had been held to arise.[106]

Extra-hazardous activities

The first concerned so-called 'extra-hazardous activities'.[107] Many of the decisions in which a non-delegable duty has been held to arise concern defendants who have allowed their land or premises to be used in a way which poses a danger to others, while at the same time being in a position to insist that reasonable care be exercised. So in *Black v Christchurch Finance Company Ltd*,[108] an independent contractor negligently lit a fire on the defendant's land so as to burn off bush. The fire spread to the plaintiff's land. Notwithstanding an assumption by the Privy Council that the contractor lit the fire in breach of contract, which had specified that burning should take place at a favourable time, the defendant was held to be liable. The basis of this decision was that, in the context of dangerous activity on its land, the defendant had been under a non-delegable duty to 'use all reasonable precautions'. But it is not easy to understand how an activity can be classified as carrying inherent risk independently of the precautions taken to minimise the risk. Indeed, the principle has been judicially described as anomalous and unsatisfactory, to be applied as narrowly as possible.[109] In *Woodland* Lord

104 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550; 120 ALR 42 at 62 per Mason CJ and Deane, Dawson, Toohey and Gaudron JJ; BC9404607 (joint judgment), citing Mason J in *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686; 55 ALR 225 at 234; BC8400477. See generally N Foster, 'Convergence and Divergence: The Law of Non-delegable Duties in Australia and the United Kingdom' in *Divergences in Private Law*, A Robertson and M Tilbury (Eds), Hart, 2016, ch 7.

105 [2014] AC 537; [2014] 1 All ER 482; [2013] 3 WLR 1227; [2013] UKSC 66 at [6]–[7] (*Woodland*); R George, 'Non-Delegable Duties in Tort' (2014) 130 *LQR* 534; J Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' (2015) 74 *CLJ* 109. For somewhat similar discussion in the High Court of Australia, see *Kondis v State Transport Authority*, ibid, at CLR 687; ALR 235; see also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31, 44–6; 63 ALR 513 at 522, 532–3; *Burnie Port Authority v General Jones Pty Ltd*, ibid, at CLR 551; ALR 62.

106 Lord Sumption also mentioned other possibilities. One concerned the non-delegable duty owed by landowners to prevent the escape of water onto the neighbours' land pursuant to the rule in *Rylands v Fletcher* (1866) LR 1 Exch 265, or not to withdraw support from the land pursuant to *Dalton v Henry Angus & Co* (1881) 6 App Cas 740. His Lordship explained these cases on the basis of an antecedent relationship between the parties as neighbouring landowners, from which a positive duty independent of the wrongful act itself could be derived. Another concerned the non-delegable duty of employers of independent contractors in respect of acts by contractors which involved an obstruction to and caused danger on the highway, citing *Tarry v Ashton* (1876) 1 QBD 314.

107 *Woodland* [2014] AC 537; [2014] 1 All ER 482; [2013] 3 WLR 1227; [2013] UKSC 66 at [6]. This is the expression used in the well-known decision in *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191 at 197.

108 [1894] AC 48.

109 *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2009] QB 725; [2009] 3

Sumption described this category as varied and anomalous, adding that many of the decisions were founded on arbitrary distinctions between ordinary and extraordinary hazards which might be ripe for re-examination. He thought that their justification, if there was one, should probably be found in a special rule of public policy for operations involving exceptional danger to the public. But it is by no means obvious that the courts should strain to retain the principle, and very arguably it ought to be abandoned completely.

Protective relationships

Given his doubts about the first, Lord Sumption's second category accordingly lies at the heart of the concept of a non-delegable duty as he saw it.[110] His Lordship said that it comprised cases where the common law imposed a duty upon the defendant which had three critical characteristics. First, the duty arose not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty was a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably caused injury. Third, the duty was by virtue of that relationship personal to the defendant. The work required to perform such a duty might well be delegable, and usually was. But the duty itself remained the defendant's. His Lordship observed that in these cases the defendant was assuming a liability analogous to that assumed by a person who contracted to do work carefully. The contracting party would normally be taken to contract that the work would be done carefully by whomever he might get to do it.[111] Likewise, in certain tort cases, the defendant could be taken not just to have assumed a positive duty, but to have assumed responsibility for the exercise of due care by anyone to whom he may have delegated its performance.

Five factors were identified by Lord Sumption in establishing a personal duty of this kind.[112] They were the vulnerability of the claimant, the existence of a relationship between the claimant and the defendant by virtue of which the defendant had a degree of protective custody and control over the claimant, the claimant having no control over how the defendant chose to perform its obligations, the delegation of that custody and control to another person, and negligence by that person in the performance of the very function assumed by the defendant and delegated to him or her. A clear instance was the non-delegable duty of an employer to maintain a safe system of work,[113] and in his Lordship's opinion the time had come to recognise that the

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WLR 324; [2009] BLR 1; [2008] EWCA Civ 1257 at [73]–[78] per Burnton LJ; and see *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452 at 465. The rule has been rejected in Australia: *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513.

110 *Woodland* [2014] AC 537; [2014] 1 All ER 482; [2013] 3 WLR 1227; [2013] UKSC 66 at [7].

111 Citing *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848; [1980] 1 All ER 556 at 566 per Lord Diplock.

112 *Woodland* [2014] AC 537; [2014] 1 All ER 482; [2013] 3 WLR 1227; [2013] UKSC 66 at [23].

113 *Wilsons & Clyde Coal Company Ltd v English* [1938] AC 57; [1937] 3 All ER 628; *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906; [1987] 2 All ER 878; *Kondis v State Transport Authority* (1984) 154 CLR 672; 55 ALR 225; BC8400477.

relationships between hospitals and their patients,[114] and local education authorities and their pupils[115] fell into the same category. In *Woodland* itself, applying the above principles, the duty of a local education authority was held to be non-delegable in circumstances where a pupil suffered serious injury in the course of a school swimming lesson conducted by swimming instructors provided by an independent contractor at a pool run by another local authority.[116]

Pretty clearly the factors identified by Lord Sumption point directly towards a non-delegable duty to protect vulnerable persons. In essence, the duty arises out of an assumption of protective control by the defendant, and a lack of control and lack of an ability to take self-protective measures by the plaintiff. Indeed, his Lordship said that other examples were likely to be prisoners and residents in care homes,[117] bearing out this argument. Both are placed in situations where they are highly vulnerable to harm or abuse.

Vicarious liability or non-delegable duty?

We are in a position now to consider how the principles governing vicarious liability and those governing the imposition of a non-delegable duty relate to each other and to contrast how the vulnerability of plaintiffs might bear upon liability under each. In the case of vicarious liability the focus is on the relationship between the defendant and the wrongdoer, whereas in the case of a non-delegable duty the focus is on a protective relationship assumed by a defendant over a vulnerable plaintiff. Sometimes it is apparent that the principles can overlap. This will or may be so in a sexual abuse case where vicarious liability is imposed on a defendant for the conduct of an employee or of a person in a position 'akin to employment' and there is a close connection between the creation or enhancement of a risk inherent in the defendant's enterprise and the wrongdoing in question. In *Lister*, for example, the school could have been held to have been under a non-delegable duty, unless the view is taken that a non-delegable duty cannot apply in the case of an intentional tort.[118] But it is difficult to see why there should be a distinction

114 Approving the approach of Lord Greene MR in *Gold v Essex County Council* [1942] 2 KB 293 at 310; [1942] 2 All ER 237 at 249 and of Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343 at 359–65; [1951] 1 All ER 574 at 584–8; and see *X v Bedfordshire County Council* [1995] 2 AC 633 at 740; [1995] 3 All ER 353 at 372; *Robertson v Nottingham Health Authority* [1997] 8 Med LR 1 at 13.

115 The category is well recognised by the High Court of Australia: *Introvigne* (1982) 150 CLR 258; 41 ALR 577; BC8200087; *Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 per Gaudron, McHugh, Gummow and Hayne JJ.

116 The case was remitted for trial, and in *Woodland v Maxwell* [2015] EWHC 273 the claimant established that her injuries were caused both by a lifeguard employed at the pool and by a teacher in failing to notice that she was in difficulties in the water.

117 See, eg, *GB v Home Office* [2015] EWHC 819 (detainee who had received medical treatment in an immigration removal centre run by an independent organisation on behalf of the UK Home Office owed a non-delegable duty of care).

118 This view was taken by a majority in the High Court of Australia in *Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126; but see the dissent of McHugh J. In *Prince Alfred* [2016] HCA 37; BC201608462 at [36] the High Court declined to reconsider *Lepore* on this question, on the basis that the submissions of counsel were addressed to arguments which were rejected by a majority in that case and that there had not been sufficient material made out to persuade them to depart from it. See also *Armes v*

between a failure to take care by carelessness and by intentional conduct.[119] However, while both may operate to protect vulnerable persons, the foundation for the imposition of liability is different. Seemingly *Christian Brothers* could not have been argued as a case of a non-delegable duty, unless the De La Salle Institute could be treated as having assumed a degree of protective custody over the claimant (and having delegated performance to its brothers). But, on the face of it, no such relationship existed, the claimant being in fact in the custody of the Middlesbrough defendants.[120] On the other hand, *Woodland* clearly could not be argued as a case of vicarious liability, which cannot extend to the conduct of independent contractors.[121]

In the NZ decision in *S v Attorney-General*[122] the Court of Appeal held that the Crown was vicariously liable in respect of abuse committed by foster parents on a foster child placed with those parents by the NZ Department of Social Welfare (DSW). The majority view was that the foster parents were the agents of the DSW, albeit that the agency was of an unusual, indeed, unique, nature. However, applying the approach in *Christian Brothers*, this does not look like a case of vicarious liability, for there was no relationship 'akin to employment' between the DSW and foster parents. Indeed, foster parents are expected to act as natural parents, with the independence that that role entails, and this is the view that has been taken in the Supreme Court of Canada.[123] Even so, it might be argued that the DSW was under a non-delegable duty vis-à-vis the plaintiff, having assumed a positive duty to protect the vulnerable plaintiff from harm. Yet recent authority in the United Kingdom must throw doubt on this conclusion.

The question arose in *Armes v Nottinghamshire County Council*,[124] where the Court of Appeal of England and Wales held that a local authority was not vicariously liable for the abusive acts of foster parents, because there was no relationship akin to employment and because the provision of family life by

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Nottinghamshire County Council [2016] QB 739; [2016] 2 WLR 1455; [2015] EWCA Civ 1139 at [29]–[42] per Burnett LJ, discussed below.

119 See further below.

120 C Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37 *SLR* 113 argues that a non-delegable duty (which the author calls conferred authority strict liability) applies in circumstances where a person who has been conferred authority by the defendant over the claimant is acting within the apparent scope of that authority immediately prior to the wrongdoing. On this view *Christian Brothers* [2013] 2 AC 1; [2013] 1 All ER 670; [2012] 3 WLR 1319; [2012] UKSC 56 could have been decided on the basis of the Middlesbrough defendants owing the victims a non-delegable duty. Whether the De La Salle Institute could have been treated as having conferred authority on its brothers over the victims and thus held similarly liable is perhaps arguable.

121 Although there was vicarious liability in respect of the negligence of a teacher who went to the pool; and see above n 116.

122 [2003] 3 NZLR 450; [2003] BCL 758; [2003] NZCA 149; BC200361128; cf *A v Roman Catholic Archdiocese of Wellington* [2008] 3 NZLR 289; [2008] BCL 396; [2008] NZCA 49; BC200869038 (orphanage and Catholic Social Services not vicariously liable for abuse suffered by a child during a holiday placement with caregivers).

123 *KLB v British Columbia* [2003] 2 SCR 403; [2003] SCC 51, in which the independence of foster parents in carrying out the care of children was held to render the connection between the parents and the government too weak for the imposition of vicarious liability.

124 [2016] QB 739; [2016] 2 WLR 1455; [2015] EWCA Civ 1139; S Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster care: A Step Too Far?' (2016) 79 *MLR* 884.

foster parents was not and could not be part of the activity or enterprise of the local authority.[125] It also held, for differing reasons, that no non-delegable duty could be imposed.[126] Tomlinson LJ maintained that in order to be non-delegable a duty had to relate to a function which the purported delegator, here the local authority, had assumed for itself to perform. Fostering was an activity which the authority had to entrust to others. By arranging the foster placement, the authority discharged rather than delegated its duty to provide accommodation and maintenance for the child. Burnett LJ took the view that there could be no non-delegable duty to found a cause of action for an assault, as opposed to negligence. If, applying the principles summarised in the *Christian Brothers* case (with their carefully calibrated policy considerations) there was no vicarious liability for an assault upon a child in care, the common law should not impose liability via this different route.[127] Black LJ, like Males J at first instance,[128] held that no non-delegable duty should be imposed, even though the *Woodland* features were present, on the ground that it would not be fair, just and reasonable to do so. Key reasons were that it would impose an unreasonable financial burden on local authorities and would be likely to provoke the channelling of even more of the local authorities' scarce resources into attempting to ensure that nothing went wrong and, if possible, insuring against potential liability; there was a fear that it would lead to defensive practice in relation to the placement of children, who might be placed in local authority run homes instead in order that the authority could exert greater control over their day-to-day care; it would be difficult to draw a principled distinction between liability for abuse committed by foster parents and liability for abuse committed by others with whom a local authority decided to place a child, including its own parents; and a parent would not have a strict liability for harm caused by someone to whom he or she had entrusted the child's care, such as a nanny or friends or relations, and it was difficult to see why the local authority's liability should be more onerous.

Black LJ's opinion in *Armes v Nottinghamshire County Council* that Lord Sumption's five indicia for the instant form of non-delegable duty were satisfied certainly is supportable. The first two were accepted by the local authority, and the third — lack of control by the child — also was met. Contrary to Tomlinson LJ's view, the fourth — delegation of a function which was an integral part of the assumed duty — arguably was present, as the local authority had delegated the obligation to care for a child as a parent or guardian would. The fifth — negligence in the performance of the very function that was assumed by the defendant and delegated to another — arguably was satisfied as well. Burnett LJ's opinion that deliberate assaults could not involve any breach of delegated duty is not especially convincing.

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125 *Armes v Nottinghamshire County Council*, ibid, at [15] per Tomlinson LJ, at [28] per Burnett LJ, at [45] per Black LJ, drawing upon *KLB v British Columbia* [2003] 2 SCR 403; [2003] SCC 51.

126 *Armes v Nottinghamshire County Council*, ibid, at [23]–[25] per Tomlinson J, at [29]–[42] per Burnett LJ, at [46]–[65] per Black LJ.

127 His Lordship cited *Lepore* (2003) 212 CLR 511; 195 ALR 412; [2003] HCA 4; BC200300126 as giving powerful support.

128 *NA v Nottinghamshire County Council* [2014] EWHC 4005; [2015] Fam Law 133.

If, as has been suggested, the focus of this form of non-delegable duty is the relationship between the defendant and the victim of harm, then it should not matter how the duty to see that reasonable care is taken of the victim was breached, whether through carelessness or intentional act of the wrongdoer. Indeed, it creates a perverse incentive to defendants to plead that conduct was intentional rather than negligent in order to avoid the imposition of the duty. So we are left with the view that it was not fair, just and reasonable in all the circumstances to impose a non-delegable duty. This involves a weighing of the policy implications, and these certainly can point both ways. In *Armes v Nottingham County Council* the duty was established by statute and was different in nature to that in *Woodland*, and the policy objections to a non-delegable duty in respect of wrongdoing by foster parents, thought to be decisive by Black LJ, and supported by Tomlinson and Burnett LJ, seemingly should prevail.[129] But outside that particular context the *Woodland* principles usually will apply.

Conclusions

A number of key points arise out of the preceding discussion. First, the courts can and do take into account a principle involving the vulnerability of a victim when deciding whether to impose a personal duty on a defendant to intervene to protect the victim from harm at the hands of others. Second, a need to protect vulnerable people is prominent in the thinking behind the recent decisions widening the rules governing the imposition of vicarious liability for the wrongdoing of another. The relationship factor, now extended in Canada and the United Kingdom to include a relationship analogous to employment, coupled with the need to show a close connection between the relationship and the wrongdoing, together are well suited for the purpose. Indeed, the two limbs are intimately related and may conveniently be expressed as one. As Tipping J has observed in a decision in New Zealand,[130] a judgment must be made as to whether, in light of all relevant features of the relationship in issue, the law should or should not impose vicarious liability for misconduct which has a sufficient connection with and is within the risks created by the relationship. Third, the core rules articulated and applied in *Woodland* for determining whether a defendant should be fixed with a non-delegable duty with respect to the performance of a task by an independent contractor are aimed directly at providing a remedy for vulnerable persons. Lord Sumption's focus on the critical importance of the defendant having assumed an antecedent protective relationship certainly means that the plaintiff can reasonably expect the defendant to be responsible for his or her welfare.

In these various respects the law has been developing in directions that very arguably accord with the ethos of the day. No doubt that is indeed what the courts normally strive to do.

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129 We have not heard the last word. The decision is being taken on appeal to the UK Supreme Court.

130 *S v Attorney-General* [2003] 3 NZLR 450; [2003] BCL 758; [2003] NZCA 149; BC200361128 at [111].